C O P Y

April 14, 1950.

Clerk, United States Supreme Court
Washington, D. C.

Att: Mr. Cullinan

Re: Ostrander v. United States, No. 690

Dear Sir:

We acknowledge receipt of the memorandum for the United States in the above matter.

We do not acquiesce in the request that the action on the Ostrander petition be withheld until the Feres and Jefferson cases are decided. There are considerations present in the Ostrander case which could result in a different decision in that case than in the Feres or Jefferson case.

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Supreme Court of the United States

October Term, 1949.

No.

Catherine G. Catenhusen, individually and as Administratrix and Administratrix Cum Testamento Annexo of the goods, chattels and effects of Richard Catenhusen, deceased,

Petitioner,

against

The United States of America,

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, above named, respectfully prays to this Court for a writ of certiorari directed to the United States Court of Appeals for the Second Circuit, to the end that this Court may review the decision which the said Court of Appeals has rendered in this case; and the petitioner respectfully shows to the Court:

Federal Statute Involved.

This action is brought under the Federal Tort Claims Act, which is Title IV of Public Law, 601—79th Congress, Chapter 753, Second Session, 60 Stat. 843, *et seq.* This enactment appeared also in United States Code, Title 28, Section 921, *et seq.*, and since September 1st, 1948, is part of the new United States Code, Title 28, Secs. 1346b, 2401b and 2671-2680, inclusive. Reference

will be made to the sections appearing in the Public Law. The changes in wording in recodification does not narrow the scope of the coverage of the Act.

Statement of Case.

The action was commenced by the service of the summons and complaint on the 18th of September, 1947. On January 21st, 1949, the United States District Court, Southern District of New York, rendered an opinion dismissing the action, on the Government's motion, for lack of jurisdiction. Judgment was entered on the 4th of February, 1949, and on appeal to the United States Court of Appeals for the Second Circuit the judgment of dismissal was affirmed. The judgment of affirmance was entered on the 11th day of January, 1950.

The circumstances out of which this case arose are as follows:

In the month of February, 1947, Richard Ostrander was a patient in the Tilton General Hospital at Fort Dix, New Jersey (R. 17).* On the 1st of March, 1947, while such a patient, in the course of an operation incompatible blood was injected into his veins, from which he died (R. 18, 19, 20).

The defendant is charged with negligence and not using due care and caution in typing the decedent's blood and seeing that only blood of that type be injected into the decedent's body and incompatible types excluded, and in not selecting and maintaining competent persons to perform the proper functions of administering the proper type of blood to decedent.

* "R" refers to pages of transcript of Record.

He left his widow, his next of kin, who was appointed administratrix and authorized to bring this action (R. 17, 20).

By stipulation, it was agreed that at the time stated in the complaint the decedent was a member of the Armed Services (R. 26).

The District Court disposed of the issues on the pleadings and took no testimony.

The District Court held that since the decedent was a member of the Armed Services, he was not covered by the Federal Tort Claims Act (R. 34).

The petitioner contended that the Tort Claims Act made no distinction between members of the Armed Services or their dependents and the general body of citizens and they all were covered by the Act. She also contended that soldier in a hospital in this country was in no different position than the soldier on furlough, in *Brooks against the United States*, 337 U. S. 19.

The Court of Appeals for the Second Circuit affirmed specifically on the authority of *Feres v. United States*, United States Court of Appeals, Second Circuit, November 4th, 1949, 177 Fed. 2d 535. In the *Feres* case, the soldier died in a fire that swept the barracks in which he was quartered, in Pine Camp, New York, on December 10th, 1947, after hostilities had ceased and removed from the combatant areas. The Court of Appeals in that case predicated their decision specifically on *Dobson v. The United States*, 26 Fed. 2d 807, Cert. Den. 278 U. S. 653, and *Bradey v. The United States*, 151 Fed. 2d 742, Cert. Den. 326 U. S. 795. Cases arising under an unrelated act affecting only maritime acts are not a general waiver of immunity.

Certiorari was granted in the *Feres* case on March 13th, 1950.

Jurisdiction of This Court.

The jurisdiction to review through the procedure of certiorari the decision of the Court of Appeals in this case is conferred upon this Court by provisions of Title 28, United States Code, Section 1254 and Section 2101.

The Question Involved.

In *Brooks v. U. S.*, 337 U. S. 49, this Court held that the Government is liable under the Tort Claims Act to a soldier on furlough for injuries then tortiously inflicted by other military personnel. The questions presented here are:

1. Is a soldier on hospital status in an army hospital as distinguished from military duty entitled to recover for injuries caused by negligence of army hospital personnel acting within the scope of their employment?

2. If for reasons of policy or military discipline, a soldier should not sue while a member of the armed services, is his dependents, nevertheless, entitled to sue under the Federal Tort Claims Act?

3. Did the death of petitioner's husband arise out of injuries received which were incident to his service as a soldier and does that fact deny recovery to his dependents under the Federal Tort Claims Act?

The Reasons Why Certiorari Should Be Granted.

1. This is the case which this Court left open for decision when it rendered its opinion in *Brooks v. U. S.*, 337 U. S. 49.

2. The several Courts of Appeal to which the problem have since been put, are not in agreement. The decisions of the Second Circuit in this case, in *Feres v.*

U. S., 177 Fed. 2d 535, is denying the coverage and in *Jefferson v. The U. S.*, in the Fourth Circuit, 178 Fed. 2d 518, are in conflict with the decision of the Tenth Circuit in *Griggs v. U. S.*, 178 Fed. 2d, page 1, which where recovery was allowed.

A petition for writ of certiorari has already been granted in this Court in the *Feres* and *Jefferson* cases.

We are advised that the Government will file a petition in the *Griggs* case.

3. Petitioner's case involves important and novel questions of Federal Law which should be settled by this Court.

4. The case is of great public interest since it involves the rights of servicemen and of veterans of World War II under the Tort Claims Act.

5. It should be reviewed also because it has been incorrectly decided by the Court below for the reasons given in brief in support of this petition.

6. In a memorandum filed by the United States in the *Feres* case and the *Jefferson* case, in not opposing certiorari in those cases, the Solicitor General states:

> "From these cases and many others which are pending in the various United States District Courts, it is apparent that the question is one of considerable importance.
>
> "While we regard the decision of the Court below as correct, we believe that the conflict among the Circuits and the importance of the question calls for an authoritative decision by this Court. Consequently, we do not oppose the granting of a petition."

WHEREFORE, upon the foregoing and upon the annexed brief, a writ of certiorari should be issued under the seal of this Court to review the decision of the Court below.

Dated: March 16th, 1950.

CHARLOTTE E. OSTRANDER,
Individually and as Administratrix, etc., of
Richard Ostrander, deceased,
Petitioner,
By DAVID H. MOSES,
Her Attorney,
Office & P. O. Address:
70 Lafayette Avenue,
Suffern, New York.

LEXOW & JENKINS,
Attorneys for Petitioner,
Office & P. O. Address:
70 Lafayette Avenue,
Suffern, New York.

Supreme Court of the United States

OCTOBER TERM, 1948.

No.

CHARLOTTE E. OSTRANDER, individually and as Administratrix and Administratrix *ad prosequendum* of the goods, chattels and credits of Richard Ostrander, deceased,

Petitioner,

against

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Preliminary Statement.

The statement of matters involved, jurisdiction and questions presented appears in the petition for a writ of certiorari herein and in the interest of brevity are incorporated herein by reference.

Opinions Below.

There was no opinion in the Court of Appeals below. That Court specifically affirmed on the authority of *Feres v. United States* (2nd Circuit), 177 Fed. 2d 535 (Nov. 4, 1949); cert. granted March 13, 1950. The opinion in the District Court appears fully in the record which has been filed with this Court (R. 12).

Summary of Argument.

1. The Federal Tort Claims Act as written permits recovery to the widow of a deceased soldier injured by an employee of the Government. There is nothing in the legislative history of the Act or its purpose that permitted the Court below to read into the Act an exception that a dependent of a soldier is not entitled to sue under the Federal Tort Claims Act for death arising out of injuries received in an operation in this country after hostilities had ceased. The Court below is reading an exception into the Act specifically stricken out by Congress when considering the bill.

2. The decision of *Feres v. United States* specifically relied upon by the Court below in this case is erroneous. In that case the Court of Appeals below relied upon two decisions under a maritime statute enacted many years ago and under an act which was not a general waiver of immunity or enacted for the purpose of relieving Congress of the burden of considering private Tort Claim Bills. The authoritativeness of the *Feres* case as a precedent can now be questioned since this Court, on March 13th, 1950, has granted certiorari at the instance of counsel for the petitioner in this case. An application will be made to argue the *Feres* case with the case at bar if certiorari be granted herein.

3. If a distinction is to be made between injuries that were incident to service as a soldier and otherwise, a soldier on an operating table is performing no military duties and therefore the injuries received cannot be considered as incident to his service. The proximate cause of the decedent's death was not his service as a soldier, but the negligence of an employee of the Government. A soldier on hospital status is in no different or worse position than soldier on furlough, whose recovery for injuries was approved in the *Brooks* case.

POINT I.

There is nothing in the wording of the Act, its legislative history or purpose that permitted the Court below to read into the Act an exception that the legal representatives of a deceased soldier were not entitled to sue for the death of the soldier arising out of injuries received while a patient in a hospital in this country.

This Court, in *Brooks v. United States,* 337 U. S. 49 (May 16, 1949), unequivocally stated (p. 51):

> "The statute's terms are clear. They provide for District Court jurisdiction over *any* claim founded on negligence brought against the United States. We are not persuaded that 'any claim' means 'any claim but that of servicemen.' The statute does contain twelve exceptions (Sec. 421). None exclude petitioners' claims. One is for claims arising in a foreign country. A second excludes claims arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war. These and other exceptions are too lengthy, specific and close to the present problem to take away petitioners' judgments. Without resorting to an automatic maxim of construction, such exceptions make it clear to us that Congress knew what it was about when it used the term 'any claim.' It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed. The overseas and combatant activities exceptions make this plain."

The rule of construction is that applied by this Court in *U. S. v. The Aetna Casualty Company,* decided December 12th, 1949, U. S. , 94 Law Ed., 151, page 161:

> "In argument before a number of District Courts and Courts of Appeals, the Government relied upon the doctrine that statutes waiving sovereign im-

> munity must be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in *Anderson v. John L. Hayes Constr. Co.*, 243 N. Y. 140, 147, 153 N. E. 28:
>
> > " 'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.' "

There should be no need to quote familiar canons of statutory construction that when the meaning of the statute is plain the sole function of the Courts is to enforce its terms. See *Caminetti v. U. S.*, 242 U. S. 470, 485; *Osaka Shosen Kaisha Line v. U. S.*, 300 U. S. 98, 101.

In *Equitable Life Assurance Society v. Pettus*, 140 U. S. 226, 233, 35 L. Ed. 497, 500, 11 S. Ct. 822, 825, the Court said:

> "This construction is put beyond doubt by section 5986 which, by specifying four cases—in which the three preceding sections 'shall not be applicable' necessarily implies that those sections shall control all cases not so specified."

The specific exclusions, therefore, carry the implication that all claims not thus excluded may be successfully asserted.

While a statute in derogation of sovereignty must be strictly construed (*United States v. Sherwood*, 312 U. S. 584, 61 Sup. Ct. 767, 85 L. Ed. 1058, 1941), the interpretation must not be so narrow as to defeat the statute's purpose (see *Canadian Aviator, Lim., v. United States*, 324 U. S. 215, 222, 65 Sup. Ct. 639, 643, 89 L. Ed. 901, 907, 1945; 3 Sutherland, Statutory Construction, Sec. 6302, 3d Ed., Horack, 1943).

Mr. Justice Holmes in *United States v. Pulaski Co.*, 243 U. S. 105, stated (p. 106):

> "There is a strong presumption on that the literal meaning is the true one, especially as against a construction that is not interpretation, but perversion; that takes from the proviso its ostensible purpose to impose a condition precedent. * * *"

The Act is a general waiver of immunity intended to do away with the old practice of waiving sovereign immunity by special act.

No more involved refinement of construction can be imagined than that now urged by the Government in its efforts to avoid the inevitable results implicit in the *Brooks* decision.

The Government in effect says that Congress, having made detailed exclusions from the coverage of the Act, nevertheless really intended another important exclusion, but forgot or overlooked to write it in and that, therefore, the Court should do so by judicial fiat; that Congress, although it considered excluding all members of the Armed Forces from the coverage of the Act, nevertheless rejected such exclusion, but intended to exclude some, but forgot or overlooked doing so, and that, therefore, the Court must do so by judicial fiat; that Congress, while still considering the bill and envisaging certain dire consequences if all torts arising from combatant activities during time of war were included, therefore excluded such torts, but intended to exclude more, or rather intended to exclude a certain class of claimants, whether or not engaged in such combatant activities, but that Congress likewise forgot or overlooked doing this also, and that, therefore, the Court must do so by judicial fiat.

The legislative history precludes the construction put upon the Act by the Court below.

Utterly conclusive of the case would seem to be the fact that Congress specifically considered and deliberately

rejected an exception having exactly the same effect as that which the Court below now writes into the Act. This is to be seen undeniably in the following circumstances:

The original predecessor of the Federal Tort Claims Act was a bill, H. R. 7236, introduced in the 76th Congress. It, like the present law, provided for general waiver of the Government's immunity to tort suits and in it there were listed substantially the same twelve exceptions and exclusions which appear in the present Act. But in addition to these, there was at that time another exception proposed which would have excluded from the coverage of the Act:

> "Any claim for which compensation is provided by the * * * World War Veterans' Act of 1924, as amended."

The theory of this exception, just as the Government now urges in support of the lower Court's decision in the present case, was that the World War Veterans' Act of 1924, as amended, confers certain governmental benefits, such as the right to compensation payments, upon all persons injured while in the armed services of the United States, and therefore such persons should not also have the benefit of a general statute permitting tort suits against the Government. The clear purpose and effect of the proposed exception was thus to exclude all members of the armed services from rights of action under the contemplated statute. Conversely, it seems to have been considered obvious (see Congressional Record, Vol. 86, Pt. II, 76th Congress, 3d Sess., 1940, pp. 12015-12032, and see also footnote, p. 212, *Jefferson v. United States,* 74 F. Supp. 209), that under the proposed statute's general opening of the way to tort suits against the Government, members of the armed services would be able to sue like all other persons unless some such exception was expressly written into the statute. Though debated, the bill was, of course, not enacted by the 76th Congress.

In the 79th Congress, the same bill, retitled H. R. 181, was again introduced with all its exceptions including the additional, or thirteenth, exception quoted and discussed above. Congress again considered the bill, *struck out of it the exception in question,* and enacted the remainder as the present Federal Tort Claims Act. Yet the Court below now sees fit to put back into the statute the exact effect that Congress deliberately struck out of it! In this it is respectfully submitted, the Court exceeded its province.

The Federal Tort Claims Act, as its history partially outlined above indicates, was no hasty or ill-considered piece of legislation. And the Court below does wrong to treat it as if it were. The Court does wrong to assume that Congress was not aware of or did not comprehend what it was doing, even though it used words "crystal clear," when it enacted a statute broad enough to include within its scope members of the armed services along with all other persons generally. The Court does wrong to assume that when Congress gave its attention to the subject of exceptions or exclusions from the Act and carefully etched out twelve such exceptions, it overlooked and failed to mention a thirteenth exception which it really intended. Certainly and above all, the Court does wrong when it disregards the fact that Congress did consider such thirteenth exception. And for the Court to write the effect of that exception back into the statute after Congress deliberately and specifically struck it out, is unjustifiable.

In the Report of the Joint Committee pursuant to H. Con. Res. 18, 79th Congress, 2d Session, House Report No. 1675, it is stated at page 25:

> "2. Delegation of Private Claims
>
> "Recommendation: That Congress delegate authority to the Federal courts and to the Court of Claims to hear and settle claims against the

Federal Government; and that Government agencies and departments be empowered to handle local and private matters now provided for in private bills, such as private pension bills and legislation authorizing construction of bridges over navigable streams.

"Congress is poorly equipped to serve as a judicial tribunal for the settlement of private claims against the Government of the United States. This method of handling individual claims does not work well either for the Government or for the individual claimant, while the cost of legislating the settlement in many cases far exceeds the total amounts involved.

"Long delays in consideration of claims against the Government, time consumed by the Claims Committees of the House and Senate, and crowded private calendars combine to make this an inefficient method of procedure.

"The United States courts are well able and equipped to hear these claims and to decide them with justice and equity both to the Government and to the claimants. We, therefore, recommend that *all claims for damages* against the Government be transferred by law to the United States Court of Claims and to the United States District Courts for proper adjudication.

"We further recommend that private pension bills and other bills dealing with purely local and private matters, including the authority to construct bridges over navigable streams, be delegated to the proper agencies of government for final determination." (Italics ours.)

In the Senate Report No. 1400 to accompany S.2177, at pages 18 and 19, it is stated:

"Part 2. Provisions Applicable to Both Houses

"Section 121. Private bills banned

"This section bans private bills, resolutions and amendments authorizing or directing the payment

of property damages for personal injuries *or death or for pensions;* the construction of bridges across navigable streams; or the correction of military or naval records. It is provided, however, that the provisions of this section shall not apply to private bills or resolutions conferring jurisdiction on the Federal courts to hear, determine, and render judgment in connection with private claims otherwise cognizable under the Federal Tort Claims Act if the claim accrued between January 1, 1939, and December 31, 1944, the last day being the day before the effective date (for the purpose of accrual of claims) of the Federal Tort Claims Act. This will permit consideration of bills or resolutions covering claims going back for a period of 6 years and would seem to be ample to prevent any inequities." (Italics ours.)

(p. 29)

"Title IV—Federal Tort Claims Act

"This title waives, with certain limitations, governmental immunity to suit in tort and permits suits on tort claims to be brought against the United States. It is complementary to the provision in title I banning private bills and resolutions in Congress, leaving claimants to their remedy under this title."

Therefore it seems evident to us that Congress wanted to rid itself of the great number of private bills for relief of military personnel and their families presented at every session.

Several cases arising under the Act have been interpreted as its primary purpose or intention to relieve Congress of the burden of dealing by private acts Tort Claims and construction put upon the Act by the Court below and the Government defeats that purpose.

United States v. South Carolina State Highway, 171 Fed. 2d 893.

State Farm Mutual Liability Insurance Co. v. United States, 172 Fed. 2d 737.

The position now assumed by the Government in litigation under the Act is at variance with the original purpose of the Act as so indicated by Congress.

For the first time in the history of this country has there been peace-time conscription and the present activities of the Federal Government reach corners never dreamt of by the founding fathers. It should not seem unusual that co-related with this extension of Government activity that there should be assumed Government liability and waiver of immunity from suit.

The chief contention of the Government is that Congress must have intended to exclude members of the Armed Services (and their wives and dependents) because of the growth over the years of a system of pensions and benefits. This argument does not square up fully upon analysis. A reading of the several statutes mentioned does not seem to indicate that the allowances granted thereby are "rights," or that they will be allowed in all cases, especially where the claim is that there is recurrence of a condition or injury received in time of war, 38 U. S. C., Sections 501 (a) and 501 (a-1).

Certain principles govern the determination whether the additional disability results from an injury or aggravation of an existing injury and the claimant must establish causation, 38 C. F. R. Cum. Supp., Section 2.1123 (b).

Although the Government may have been liberal in one sense, in a system of benefits and pensions, the system is not so all-inclusive and complete as to lend support to the contention that it is a complete substitute for a claim under the Federal Tort Act.

Furthermore, the argument of the Government completely ignores the proposition that there is no vested right to a pension or other benefit which is merely a

bounty from a grateful Government which Congress could recall, limit, destroy or change (*In re Lindquist Estate,* 144 Pac. 2d 438, 154 Pac. 2d 879, cert. denied 325 U. S. 869, 89 L. Ed. 1988).

The argument of the Government is that a *dependent* of a soldier has no *rights* under the Federal Tort Claims Act because the soldier may have some *privileges* under some other acts enacted at different times and for totally unrelated circumstances and purposes.

We submit that such argument is unsound and unwarranted.

POINT II.

The decision in *Feres v. United States*, relied upon by the Court below, is erroneous.

The Court of Appeals below affirmed specifically on the authority of *Feres v. United States,* 177 Fed. 2d 535, cert. granted March 13th, 1950. That case in turn relied on *Dobson v. United States,* 27 Fed. 2d 807, cert. d. 278 U. S. 653, and *Bradey v. United States,* 151 Fed. 2d 742, cert. d. 326 U. S. 795, as well as *Jefferson v. United States,* 77 Fed. Supp. 706, 178 Fed. 2d 518, cert. granted March 13th, 1950.

This Court in alluding to the *Dobson* and *Bradey* cases stated in *Brooks v. United States, supra,* page 62:

> "But we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired. Were the accident incident to the Brooks' service, a wholly different case would be presented. We express no opinion as to it, but we may note that only in its context do

> *Dobson v. United States*, 27 F. 2d 807, *Bradey v. United States*, 151 F. 2d 742, and *Jefferson v. United States*, 77 F. Supp. 706, have any relevance. See the similar distinction in 31 U. S. C. Sec. 223b. Interpretation of the same words may vary, of course, with the consequences, for those consequences may provide insight for determination of congressional purpose. *Lawson v. Suwanee Fruit & Steamship Co.*, 336 U. S. 198."

The decisions in the *Dobson* and *Bradey* cases are founded upon acts whose legislative history and purpose are no parallel to the Federal Tort Claims Act. The danger in drawing general conclusions from decisions under other statutes is admirably set forth by Mr. Justice Frankfurter in *Federal Trade Commission v. Bunte*, 312 U. S. 349, 353:

> "Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business."

The Court below in relying upon those two cases may have overlooked that the Tort Claims Act, Section 421(d), provides:

> "(d) Any claim for which a remedy is provided by the Act of March 9, 1920 (U. S. C., Title 46, Secs. 741-752, inclusive), or the Act of March 3, 1925 (U. S. C., Title 46, Secs. 781-790, inclusive), relating to claims or suits in admiralty against the United States."

Thus, we must assume that Congress was aware of the decisions in the *Dobson* and *Bradey* cases because they expressly excluded all claims arising under the acts in those cases from the Tort Claims Act. We cannot assume that in making this exclusion they didn't know how the Courts construed those acts.

It is, therefore, logical to assume when Congress came to write all the other exceptions they intended to in-

clude members of the Armed Forces except in those instances specifically excluded (i. e.) Subdivisions (j) and (k) and possibly (a) of Section 421.

Not only is there a serious difference of wording in the acts interpreted in the *Dobson* and *Bradey* cases, but it must be important to bear in mind that the Federal Tort Claims Act represented a marked departure by the United States with respect to the waiving of sovereign immunity.

The Act, passed as an integral part of the Legislative Reorganization Act of 1946 (60 Stat. 812, 842, 28 U. S. C. A., 921-46), has a double purpose. It removed the anachronistic doctrine of sovereign immunity to actions in tort, thus making the Government, the largest of all businesses, liable for the negligence of its employees acting within the scope of their employment and it relieved Congress of the burden of handling the thousands of private bills for relief that were presented each year in the absence of any other remedy. See Sen. Rep. No. 1400, 79th Cong., 2d Sess. (1946), H. R. Rep. No. 1287, 79th Cong., 1st Sess. (1946).

These broad purposes show a new policy and different philosophy than that underlying the *maritime* statutes construed in *Dobson v. U. S.*, 27 F. 2d 807, and *Bradey v. U. S.*, 151 F. 2d 742, and it is submitted that these decisions should not be used to whittle down the Act by implication. The acts interpreted in the *Dobson* and *Bradey* cases were special acts waiving immunity under certain conditions and to limited extent.

The same view of the scope of the Act has been taken by the Circuit Court of Appeals for the Ninth Circuit in an opinion filed on April 8, 1948, in *Employees' Fire Insurance Co., et al., v. U. S.*, Civil Action No. 11743, 167 F. 2d 655. In reversing a District Court decision that an insurance company had no right of subrogation under the Act, the Circuit Court of Appeals said:

"The words of the Act indicate a clear and sweeping waiver of immunity. * * * The Government has premised its position largely on the principle that statutes in derogation of sovereign immunity must be strictly construed. Where a statute contains a clear and sweeping waiver of immunity from suit on all claims with certain well defined exceptions, resort to that rule cannot be had in order to enlarge the exceptions."

POINT III.

If we assume Congress intended that injuries that were "incident to service" are not covered by the Act, the proximate cause of the injuries causing decedent's death in this case was not an act "incident to service."

What is overlooked is that a soldier upon the operating table is performing no military duty—he is receiving administrations from a Government "employee" (Sec. 402[b] of the Act) and the "employee" is "acting within the scope of his office or employment" (Sec. 402[c] of the Act).

Neither as a matter of pleading nor fact may it be said that the injury received by the decedent was "incident to * * * service."

In the *Brooks* case this Court did not define the phrase "incident to service." It has, however, been defined by the Judge Advocate General's Department to mean "* * * while engaged in the actual performance of some official duty." See Judge Advocate General's School, Claims By and Against the Government, 39 (text No. 8, 1944).

Is a soldier in a supine position on an operating table and under the influence of an anesthetic while surgery is being performed on him engaged in the actual per-

formance of some official duty? We think it is obvious that he is not engaged in any kind of activity or duty, official or otherwise, and that therefore injuries so sustained are not incident to his service. If this is true, our case on the facts come within the ruling of the Supreme Court in *Brooks* and recovery should be allowed.

The decedent in this case, after his return from the combatant areas and active duty, consented to what he thought was a minor operation prior to his discharge from service. In consenting to this operation, he was not performing any duty as a soldier but accepting a service from the Government. He was in no different or worse position than either a soldier on furlough, a soldier no longer on active duty or a soldier honorably discharged, a veteran, or a deserter.

Those undertaking to perform this service for the Government were agents of the Government under the Federal Tort Claims Act and as such were required to act with due care and upon their failure to do so the Government is liable.

In the *Brooks* case, *supra*, the soldiers were on furlough yet recovery was allowed.

The Second Circuit sought to distinguish this Court's decision in the *Brooks* case on the ground that military personnel on furlough "were not on active duty" (*Feres v. U. S.*, 177 F. 2d 535, 537). We submit that the Court erred in attempting to draw such a distinction.

There is no doubt whatever that a soldier on furlough is on active duty. He receives army pay and allowances (see The Judge Advocate General School's Text No. 3, "Military Affairs," p. VIII-25), is subject to the Articles of War and courts-martial (see Manual for Courts-Martial, U. S. Army, 1949, par. 10, pp. 10-11), and is entitled

to army hospitalization and medical care (see second Fourth Circuit decision in *Brooks* case, 176 F. 2d 482). If injured while on furlough and discharged from the army, he is entitled to benefits under the Veterans Act only because he was disabled in line of duty while on *active* duty. Active duty status is one of the prerequisites of the Veterans Act of 1924, as amended, which provides for the payment of disability benefits (38 U.S.C.A. 701 [a]) to:

> "(a) Any person who served in the active military or naval service and who is disabled as a result of disease or injury or aggravation of a preexisting disease or injury incurred in line of duty in such service."

If fatally injured while on furlough, his legal representative is entitled to the six months death gratuity (10 U.S.C.A. 903 and 456 a). These benefits inure to the soldier on furlough, as was illustrated in the *Brooks* case, solely because he was on active duty and was injured "in line of duty." The theory is set out in *Moore v. U. S.*, 48 Ct. Cl. 110, 113:

> "As a general proposition, we believe a soldier is in line of duty until separated from the service by death or discharge, if during such time he is submitting to all of its laws and regulations. * * * The provisions for furloughs or leaves of absence are a part of the disciplinary regulations of the military service, and no more separate a man from the service than an order to report to a different command."

For the historical development of the rule see the Judge Advocate General School's Text No. 3, "Military Affairs" (1943 ed), pages X-26 to X-34.

A soldier on hospital status, we submit, is no more engaged in military business than one on furlough. And certainly, the surgical operation performed on petitioner

had nothing to do with his army career. The thing common to both furlough and hospital status is that each aids the soldier's well-being. To be sure, under each a soldier is at all times subject to military control. That, however, is not enough, under this Court's decision in the *Brooks* case, to deny the benefits of the Tort Claims Act.

Whether injured on furlough or in an army hospital, each is entitled to the same statutory benefits for disability incurred in line of duty, and it is submitted that both should be entitled to the benefits of the Tort Claims Act.

In *Santana v. United States,* 175 Fed. 2d 320, the United States Court of Appeals, First Circuit, June 10, 1949, the soldier was a discharged veteran and received injuries at a veterans' hospital which resulted in his death when he returned for medical treatment. There the order of the District Court, dismissing his complaint, was reversed.

In *Griggs v. United States,* the Court of Appeals for the Tenth Circuit, 178 Fed. 2d, p. 1, November 16, 1949, the soldier was not on combat duty and was admitted under official orders to the army hospital at Scott Field Air Base at Illinois for the purpose of surgery and treatment. While at that hospital and performing no military service, after hostilities had ceased, he received injuries caused by the negligence and unskillful acts of members of the Army Medical Corps, acting within the scope of their office of employment, from which he died. His legal representative was held entitled to maintain an action under the Federal Tort Claims Act.

Assume the decedent was a deserter from the army, obviously he would be performing no military duty. Under the reasoning of the Courts below, such a deserter would be entitled to recovery if he was injured by an

employee of the Government but a soldier who consented to a remedial operation prior to his discharge would not be.

Assume the decedent in this case was returned home on furlough or was discharged and came back as a veteran, he would be entitled to recovery.

If there are reasons of policy or discipline to prohibit a soldier from suing the Government while a member of the armed services, that disability should not destroy any rights he may obtain under a statute or be carried over to his dependents. Very often penal statutes disable a convict from suing while under the disability of a sentence. That disability, however, does not carry over to the convict's family or assignee and is personal to the convict and is removed when he is no longer under the consequence of his criminal sentence.

See:

Green v. State of New York, 278 N. Y. 15.
Bamman v. Erickson, 259 A. D. 1040, 21 N. Y. S. 2d 40.

We do not think that Congress intended such subtle and fine distinctions in the application of the Act, and the decision below is, therefore, erroneous and contrary to law.

Upon all that is herein set forth, the petitioner prays that her application for a writ of certiorari should be granted and that the decision of the Court below should be reviewed and reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 690

CHARLOTTE E. OSTRANDER, INDIVIDUALLY AND AS ADMINISTRATRIX AND ADMINISTRATRIX AD PROSEQUENDUM OF THE GOODS, CHATTELS AND CREDITS OF RICHARD OSTRANDER, DECEASED, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

This is the fourth in a series of cases filed this Term raising the question of whether death or injury sustained by a member of the armed forces incident to his military service is compensable under the Federal Tort Claims Act. In two of these earlier cases, we filed memoranda stating that we were not opposed to the granting of the petitions for writs of certiorari, and those petitions were granted on March 13, 1950. *Feres* v. *United States,* No. 558, this Term; *Jefferson* v. *United States,* No. 381 Misc., this Term. The

third case in which the Court of Appeals for the Tenth Circuit reached a conclusion directly the opposite of those reached in the *Feres* and *Jefferson* cases is now pending on our petition for a writ of certiorari. *United States* v. *Griggs,* No. 685. this Term.

The question involved in the instant case is therefore already before the Court. Moreover, the *per curiam* opinion of the court below rests solely on its earlier decision in the *Feres* case, as to which certiorari has already been granted. We accordingly suggest that, if the Court deems it advisable, action on the instant petition be withheld until the *Feres* and *Jefferson* cases are decided, at which time final disposition could be made of the present case by granting the petition and either affirming or reversing the decision of the court below. (See *e. g., Denham* v. *Munson Lines,* 312 U. S. 650, held pending decision in *Reconstruction Finance Corp.* v. *Prudence Group,* 311 U. S. 579).[1]

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

APRIL 1950.

[1] Counsel for the present petitioner is also counsel for the petitioner in *Feres*, No. 558.

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